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EXPORT CONTROLS

Commerce's Assessment of the Foreign Availability of Controlled Items Can Be More Effective

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The Honorable C. William Verity
The Secretary of Commerce

The Honorable Frank C. Carlucci
The Secretary of Defense

This report presents the results of our examination of the Department of Commerce's procedures for conducting assessments of militarily significant commercial products to determine if they are freely available to the Soviet bloc from other countries—known as "foreign availability." The Commerce Department, in consultation with the Department of Defense, is required by the Export Administration Act of 1979 and the Export Administration Amendments Act of 1985 to assess foreign availability. We conducted this review as part of our ongoing efforts to assess key parts of the national security export control program and because of congressional interest in the foreign availability program.

This report contains recommendations to you in chapter 2. The head of a federal agency is required by 31 U.S.C. 720 to submit a written statement on actions taken on these recommendations to the Senate Committee on Governmental Affairs and the House Committee on Government Operations no later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of the report.

We are providing copies of this report to appropriate House and Senate committees; the Secretary of State; the Director, Office of Management and Budget; and other interested parties.

Frank C Conahan

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Assistant Comptroller General

Executive Summary

Purpose

Since 1949, the United States and its allies have controlled the export of militarily significant commercial products to the Soviet bloc. Beginning in 1977, the Congress directed that such products not be controlled if they are freely available to the Soviet bloc from other countries—known as "foreign availability"— unless the President determines that national security requires such control.

The Department of Commerce is responsible for administering the foreign availability program. This report examines the process of conducting foreign availability assessments.

Background

The Export Administration Act, as amended in 1977 and 1979, and the Export Administration Amendments Act of 1985 provide for decontrolling goods and technology because of foreign availability. The 1985 act was driven by congressional interest in reducing the number of products and related technologies subject to export control. Foreign availability studies fall into two basic categories: reviews and assessments. Reviews are Department of Commerce in-house analyses used as part of the annual review of the U.S. control list.[1] Assessments, which are analyses that can lead to decontrol independent of the list review process, conform to the legal requirements of the 1985 act and are to be performed in accordance with foreign availability regulations.

Through July 1987, Commerce had initiated 38 reviews and 35 assessments. Nine of the foreign availability assessments were completed, and 26 were in process. Of the completed nine, two resulted in decontrol based on foreign availability. In three instances, Commerce reinterpreted the existing controls and decided that there were no licensing requirements. In the remaining four cases, Commerce found that foreign availability did not exist and that continued licensing was therefore required.

Results in Brief

Commerce's foreign availability procedures have three principal weaknesses that limit their effectiveness:

- Commerce takes too long to process foreign availability determinations because of difficulties in obtaining necessary information and because of

[1]Section 5(c)(3) of the act requires that the Secretary of Commerce review the U.S. control list at least once each year to make necessary revisions to the list, including additions and deletions.

its reluctance to finalize determinations without the concurrence of the Department of Defense.

- There is a lack of information-sharing between Commerce and Defense.
- Commerce's regulations do not specify what information will satisfy its criteria for determining foreign availability.

Principal Findings

Time to Determine Foreign Availability

Commerce consistently takes considerably longer to make determinations than the 90-day processing time envisioned in the Export Administration Act and the regulations. Processing time for the nine completed cases averaged 16 months. Incomplete cases had been in process up to 47 months as of July 1987. Since the Congress has directed that the United States not control goods that are freely available to the Soviet bloc, these long processing times for determining foreign availability slow achievement of this objective.

The extended processing times result from (1) difficulties in obtaining the necessary evidence and (2) Commerce's reluctance to publish a determination when there is disagreement with Defense. Though there have also been delays in publishing determinations when Commerce and Defense agree, Commerce appears to be especially reluctant to publish without Defense concurrence. The 1985 act requires "consultation" with Defense. While Commerce believes it has the authority to make determinations despite Defense objections, it appears to be reluctant to exercise that authority.

Legislation passed by the House (H.R. 3) and Senate (S. 1420) and now in conference imposes deadlines for making foreign availability determinations. This legislation dictates that if no determinations are published by the deadline, an export license is not required. If enacted, such deadlines will require Commerce to expedite its research and overall decision-making process.

Potential Information Sharing Improvements

Neither Commerce nor Defense fully shares the evidence it develops in assessing foreign availability in the consultation process. At present, Commerce and Defense are at an impasse concerning access to Commerce's evidence. Commerce has offered to allow Defense to review its evidence at Commerce offices, but Defense maintains that it lacks the

resources to do so and wants Commerce to provide copies of its evidence. Also, although Defense acknowledges the need for improved information-sharing, Commerce maintains that Defense is not sharing information.

Until recently, Commerce did not make sufficient efforts to obtain available evidence and access to the technical staff of other agencies when initially developing its evidence. Other agencies, which could provide relevant information, were generally not advised of ongoing assessments until they were provided with Commerce's draft assessment. Commerce officials, however, advised GAO in July 1987 that they were beginning the practice of notifying other agencies when initiating an assessment and requesting any relevant information. The first notifications were sent on July 23, 1987.

Information Used to Satisfy Foreign Availability Criteria

According to Commerce regulations, four criteria must be met to establish foreign availability. The foreign product must be of comparable quality to the U.S. item, be available-in-fact (i.e., obtainable by one or more of the proscribed countries), not be of U.S. origin (i.e., not subject to U.S. export controls), and be available in quantities sufficient to satisfy the Soviet bloc's military needs. Commerce's regulations define each of these criteria.

In the cases it reviewed, GAO found that Commerce used a variety of evidence to support its foreign availability determinations. GAO generally found that the evidence that was used was probably what was realistically available and consistent with the information identified as acceptable in the 1985 act. GAO also found, however, that Commerce's regulations do not fully and explicitly state what information may be considered by Commerce in making foreign availability determinations or reflect the experience Commerce has gained in the past 2 years. Doing so could help enhance the quality of data and analyses provided by other agencies and the business community.

Recommendations

GAO recommends that the Secretary of Commerce direct the Under Secretary for Export Administration to amend Commerce's foreign availability regulations to fully and explicitly reflect the guidance provided in the 1985 act on the factors Commerce may use in determining foreign availability as well as to identify other evidence Commerce has found helpful in making such determinations.

GAO also recommends that the Secretary of Commerce direct the Under Secretary for Export Administration and that the Secretary of Defense direct the Deputy Under Secretary for Trade Security Policy to establish procedures for complete information-sharing consistent with the 1985 act.

Agency Comments and GAO's Evaluation

Commerce recognized and elaborated on the difficulties in processing foreign availability assessments but stated that it is not reluctant to finalize determinations despite Defense opposition. GAO believes, however, that such reluctance is demonstrated by the amount of time Commerce takes to finalize its decisions. Defense agrees with GAO's conclusion and makes several observations on the foreign availability process, noting that it has not received any additional funds or personnel to meet its consultative responsibilities.

Both departments concur with the need for better information-sharing. However, Commerce believes that it is sharing information and maintains that Defense has been unwilling to meet its information-sharing responsibilities under the law. Defense concurs with GAO's conclusion but notes that Commerce does not indicate what information has been or will be used to support its assessments. GAO believes that these differing views illustrate the impasse between the two departments. Both departments also concur with GAO's recommendation to amend Commerce's regulations to more fully reflect the kinds and quality of evidence Commerce has found valuable in making its determinations.

The State Department orally commented that GAO's report is generally accurate, fair, and thorough.

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Abbreviations

COCOM	Coordinating Committee for Multilateral Export Controls
GAO	General Accounting Office
NSC	National Security Council
OFA	Office of Foreign Availability
TAC	Technical Advisory Committee

Introduction

The United States and its allies have controlled the export of militarily significant commercial products to the Soviet bloc since 1949 through an informal organization known as the Coordinating Committee for Multilateral Export Controls (COCOM).[1] Until the early 1970s, export control legislation authorized the control of export items regardless of their availability from other countries. Beginning with the Export Administration Amendments of 1977, however, the Congress directed that the President not control items available from other countries, unless he determined that national security required such control.

Provisions for decontrolling goods and technology because of foreign availability were included in the Export Administration Act as amended in 1977 and 1979. The Export Administration Amendments Act of 1985 expanded the applicability of the foreign availability provisions. The Department of Commerce is required by the 1985 act to initiate and review claims of foreign availability on goods and technologies controlled for national security purposes.

The 1985 amendments were driven by congressional interest in reducing the number of products and related technologies subject to export controls. The act included provisions that (1) Commerce's foreign availability division be upgraded to an office, (2) the Secretary issue regulations for determining foreign availability, and (3) Commerce act on Technical Advisory Committee (TAC)[2] certifications of foreign availability within 90 days and report the results to the Congress.

Commerce's Foreign Availability Procedures

The foreign availability program was formally instituted in 1983 as a division of Commerce's Office of Export Adminstration. The Office of Foreign Availability (OFA) was established on November 1, 1985, as directed by the 1985 act. For fiscal year 1987, OFA had a budget of about $1.2 million and an authorized staff of 26. As of May 28, 1987, it had an actual staff of 19, although staffing levels were much lower prior to this date. Also, Commerce notes that new staff are not able to immediately perform to their full potential because of the job's complexity and the need to obtain security clearances.

[1]COCOM's membership consists of North Atlantic Treaty Organization countries (except Iceland) and Japan. Each member country incorporates commitments made in COCOM into its own laws and regulations.

[2]Technical Advisory Committees are authorized by the Export Administration Act of 1979, as amended, to advise and assist the Secretaries of Commerce and Defense on export control matters. They also have the authority to make certifications of foreign availability to the Secretary of Commerce, which the Secretary must then review.

OFA staff perform foreign availability studies to support COCOM's list review process, assess new and ongoing U.S. foreign policy and national security controls, initiate decontrol actions, and recommend control negotiations. These studies fall into two basic categories: reviews and assessments. A review, an in-house analysis of the probability of foreign availability, is used as part of the annual review of the U.S. control list of both national security and foreign policy controls. An assessment, an analysis possibly leading to decontrol or license issuance, conforms to the legal requirements of the 1985 act and is performed in accordance with foreign availability regulations. Through July 1987, Commerce had initiated 38 reviews and 35 assessments.

On December 27, 1985, Commerce issued regulations on foreign availability procedures and criteria. OFA implements these regulations in determining foreign availability. The major phases of an assessment are (1) developing evidence, evaluating it against Export Administration regulations, and preparing the initial draft assessment, (2) consulting with other agencies, principally the Department of Defense, (3) considering the views provided by these agencies and publishing a final determination in the Federal Register, and (4) seeking decontrol to the Soviet bloc, which is referred to as West/East decontrol.

Conducting the Assessment

OFA may initiate an assessment in several ways: on its own initiative, in response to an allegation by an export license applicant, in response to a foreign availability submission for decontrol by any person or trade association, or upon certification by one of the Secretary's TACs. Once initiated, regardless of source, Commerce develops information to assess whether foreign availability exists. Information is sought from a variety of sources, including company product brochures, trade publications, U.S. and foreign manufacturers, users of the product, foreign governments, and the intelligence community. To obtain information from foreign firms and governments, OFA uses the U.S. & Foreign Commercial Service and U.S. representatives abroad. OFA analysts also visit foreign manufacturers and attend trade fairs. After OFA has developed and analyzed its evidence, a draft foreign availability assessment is prepared and reviewed within OFA. Upon the OFA director's approval, the draft is sent to Defense and selected other agencies for their review as part of the consultation process required by the 1985 act.

The Consultation Process

Defense is the principal agency in the consultation process and the only agency with which Commerce is specifically directed to consult by the

act. After receiving comments on its draft assessment, OFA sometimes meets with Defense to resolve differences. OFA and Defense may exchange letters in which OFA addresses Defense's comments and Defense provides further comments. This exchange is most common when OFA's draft indicates that there is foreign availability. OFA officials advised us that Defense often disputes such determinations, while to date it has never opposed negative determinations.

Once OFA completes its consideration of other agencies' input and makes any revisions it deems appropriate, the draft assessment is sent for higher Commerce review, through the offices of the Under Secretary for Export Administration and of the General Counsel. The authority to make the final determination rests with the Under Secretary for Export Administration.

Often, disputes are not resolved, and Commerce must make its final determination without reaching consensus with Defense. The 1985 act requires consultation but does not indicate that concurrence is necessary. In the past, when there were unresolved disputes, Commerce sometimes consulted with the National Security Council (NSC) before publishing its foreign availability determination. OFA officials, however, advised us that in the future Commerce will consult with the NSC only when an agency indicates that it will request that the President invoke the national security override provision of the act. This provision permits the President to maintain export controls despite a positive determination of foreign availability if he determines that the absence of controls would prove detrimental to national security. The President must also pursue negotiations with the foreign governments involved for the purpose of eliminating the foreign availability. If these negotiations prove unsuccessful after 18 months,[3] Commerce cannot require a license for the export of the goods or technology involved.

Decontrol

Commerce publishes its foreign availability determinations in the Federal Register. A positive foreign availability determination is followed by notice in the Federal Register that an export license will not be required for West/West (i.e., free world) trade. Commerce also initiates action with the State Department to seek West/East (i.e., Soviet bloc)

[3]According to section 5(f)(4) of the act, the President initially has 6 months to pursue negotiations. The President may extend the 6-month period an additional 12 months if the President certifies to the Congress that the negotiations involved are progressing and that the absence of the export control involved would prove detrimental to the national security of the United States. Thus, the maximum period permitted for negotiation is 18 months.

decontrol in keeping with U.S. multilateral commitments. Upon obtaining multilateral approval, Commerce publishes notice in the Federal Register that an export license is no longer required for West/East trade.

Multilateral Control and Foreign Availability

The 1985 act does not address how decontrol of an item based on foreign availability is to be coordinated with the U.S. multilateral export control commitments under COCOM. In October 1986 testimony before the Subcommittee on International Economic Policy and Trade, House Committee on Foreign Affairs, the State Department stressed the importance of decontrolling products for West/East trade in conjunction with U.S. COCOM partners. In March 11, 1987, testimony on the foreign availability program before the same Subcommittee, we agreed with administration efforts to seek COCOM concurrence for West/East export decontrol.

The first decontrol case based on foreign availability, involving wafer saws, highlighted the relationship between the foreign availability process and U.S. multilateral export control commitments. Commerce published a positive foreign availability determination in the July 8, 1986, Federal Register. On July 14, 1986, it published notice that an export license would not be required for West/West trade. Commerce also initiated action with the State Department to seek West/East decontrol through COCOM, a process that took 8 months and culminated in the publication of the West/East decontrol notice in the March 18, 1987, Federal Register. This process included 2 months to clear the necessary cables directing the U.S. delegation to initiate the COCOM process, due to differences between Commerce and Defense.

Request for and Results of Foreign Availability Assessments

Through July 1987, Commerce had initiated 35 foreign availability assessments. Nine were completed, and 26 were in process. In two of the completed cases, products were decontrolled based on foreign availability: automatic wafer saws in March 1987 and mercury-cadmium-telluride uncooled infrared laser detectors in April 1987. In three instances—involving floppy disks, Fourier transform infrared spectrometers, and Fourier nuclear magnetic resonance spectrometers—Commerce clarified that the existing controls do not require licenses. Commerce published negative determinations on the remaining four products—step-and-repeat mask alignment systems, Winchester disk drives, aerial film, and digitally controlled office switching systems.

Commerce has since decontrolled controllable pitch propellers below a specified capacity and has published a positive finding of foreign availability on stored program-controlled wire bonders in the Federal Register, both in September 1987. Notice of West/West decontrol of certain wire bonders was also published in the Federal Register in December 1987. Commerce in December 1987 also published positive findings of foreign availability on jig grinders and isopropyl N-(3-chlorophenyl) carbamate in the Federal Register as well as notice of West/West decontrol for certain jig grinders. Notice of decontrol of isopropyl N-(3-chlorophenyl) carbamate was published in the January 5, 1988, Federal Register.

Ten of the 35 assessments resulted from industry foreign availability submissions, and another 7 involved TAC certifications. Seven of the 10 cases based on industry submissions were only recently initiated—after March 1987—signifying new industry interest in the program. Company officials and TAC members have noted that industry will not actively use the program unless it results in positive foreign availability determinations and subsequent decontrol.

Objectives, Scope, and Methodology

The objective of our review was to assess Commerce's procedures for conducting foreign availability assessments. Commerce has the statutory authority to undertake decontrol actions based on its assessments, while its foreign availability reviews are only one of many factors considered in the annual U.S. control list review process. Our review focused on the foreign availability assessment process because of Commerce's broad statutory authority. Commerce is required by the Export Administration Act of 1979 and the Export Administration Amendments Act of 1985 to assess foreign availability. To understand the acts' background and Commerce's implementation of the 1985 act's requirements, we reviewed the legislative history of the acts and Commerce's regulations as published in the Federal Register. We also discussed the regulations with Commerce officials involved in their preparation.

To develop an overview of how long it takes to process assessments and to identify any processing roadblocks, we determined the key dates for each of the 35 assessments initiated through July 1987. Based on these dates, we developed a number of statistical indices to portray Commerce's processing times. These included the time it took for (1) Commerce to research and prepare a draft assessment, (2) Defense to initially review and respond to Commerce as part of the consultation process, and (3) Commerce to consider Defense's comments and publish a determination of foreign availability.

To develop an in-depth understanding of the assessment process and the evidence used by Commerce in making its determinations, we reviewed the evidence developed and used by Commerce in 7 of the 19 cases for which Commerce had completed its draft assessments. We had extensive discussions with the case analysts on their development and use of the evidence and the assumptions made in applying the evidence to the criteria necessary to establish foreign availability. In addition, we held discussions with OFA's management on the evidence necessary to establish foreign availability and the assumptions underlying these determinations.

We also reviewed Defense's comments on Commerce's draft assessments and evidence supporting those comments in two of the six cases to which Defense had responded through July 15, 1987. We held extensive discussions with Defense regarding its comments and evidence in these cases. We also obtained the views of Defense, State, and the NSC on the operation of the foreign availability program. Finally, for one of these two cases we also held discussions with several industry representatives about the information they had provided. We did not make any judgments as to the validity of Commerce's foreign availability determinations.

During the course of our review, we also met with trade association officials, members of the President's Export Council Subcommittee on Export Administration, and individual company representatives to obtain the business community's views on the foreign availability program. On March 11, 1987, we provided our preliminary views on the program's implementation in testimony before the Subcommittee on International Economic Policy and Trade, House Committee on Foreign Affairs.

Our review was conducted in accordance with generally accepted government auditing standards.

Improvements Needed to Make the Foreign Availability Program More Viable

The Department of Commerce's foreign availability procedures have three principal weaknesses that need to be addressed to strengthen the program. First, it takes too long to make foreign availability determinations due to the time necessary to develop evidence and publish determinations following consultation with the Department of Defense. Second, there is a lack of information-sharing between Commerce and Defense. Third, Commerce's regulations do not specify what information will satisfy its criteria for determining foreign availability.

Legislation passed by the House and Senate and now in conference imposes self-enforcing deadlines for making foreign availability determinations, which should help to accelerate the process. In July 1987, Commerce advised us that it has begun a procedure for notifying other agencies when it initiates a foreign availability assessment and requesting any relevant information from those agencies. This procedure should augment Commerce's research capability and reduce the time needed to develop evidence.

Making Foreign Availability Determinations Takes Too Long

The 1985 act and regulations establish a 90-day standard for making foreign availability determinations. The act stipulates a 90-day deadline for making determinations when a Technical Advisory Committee certifies to the Secretary of Commerce that there is foreign availability of specified goods or technology. In its regulations, Commerce also set a 90-day standard for processing claims of foreign availability, called foreign availability submissions.

Commerce, however, consistently takes considerably longer than 90 days to make determinations. Table 2.1 provides data on processing times. In calculating processing times, we considered an assessment complete when a determination was published in the Federal Register. This completion date was chosen because it marks the end of Commerce's direct role in the foreign availability process, even though this period may include presidential review, which is beyond Commerce's control. Additional time is then required to comply with the administration's policy of seeking COCOM concurrence for West/East decontrol, which can add as much as 6 months to the process. For cases still under consideration, we determined processing times through July 1987.

The processing time for the nine completed assessments ranged from 6 to 28 months, with a median processing time of 12 months. Incomplete cases had been in process from 1 month to almost 4 years, as of July 1987.

Table 2.1: Processing Time for Completed and Ongoing Assessments of Foreign Availability Through July 1987

Processing time in months

Description	Number of cases	Processing time			
		Mean	Median	Shortest	Longest
Certifications from TAC[a]	7	8	9	2[b]	11
Total Commerce assessments, including TAC certifications	35	11	8	1[c]	47
Completed assessments	9	16	12	6	28
In process	26	10	7	1[c]	47

[a]Includes three open cases, for which processing time is counted from the date of certification through July 1987. These cases were certified in August 1986, March 1987, and May 1987.

[b]This case was TAC-certified in May 1987 and is still being researched by Commerce.

[c]Four cases were just initiated in June 1987, and a total of 13 cases have been initiated since January 1987, none of which had been completed as of July 1987.

Reasons for the Long Processing Times

The principal reasons for the long processing times are (1) difficulties and delays in obtaining the evidence Commerce deems necessary to make foreign availability determinations and (2) Commerce's handling of differences with Defense. Table 2.2 provides processing times for three major steps: developing evidence and preparing a draft assessment, initially consulting Defense, and publishing determinations.

Table 2.2: Processing Time for Selected Steps in Assessing Foreign Availability for Decontrol Through July 1987

Processing time in months

Description	Number of cases	Processing time			
		Mean	Median	Shortest	Longest
Develop evidence and prepare assessment for initial consultation with Defense	19[a]	8	7	1	28
Defense initial review and first response to Commerce	16[b]	2	1	1	7
Initial Defense response to publication of foreign availability determination	6[c]	4	5	1	6

[a]In 16 additional cases, Commerce had not yet completed its assessments and transmitted them to Defense. These cases had been under development for up to 13 months through July 1987 and included 3 cases initiated in February 1987 and 4 cases initiated in June 1987.

[b]Defense did not respond in 3 additional cases. In these cases, Commerce made its foreign availability determinations without receiving responses from Defense.

[c]There are 26 incomplete cases. In three of the completed cases, as noted above, Defense did not respond. For those cases, 15, 8, and 4 months elapsed between the time they were sent to Defense and final Commerce action.

The longest phase of the process is the development of evidence and preparation of the initial draft assessment. It has taken from 1 to 28 months to complete this phase, with a median of 7 months. Commerce officials identified several reasons for this initial phase's length, including the difficulties of obtaining foreign proprietary information on products produced in other countries and the small number of analysts available to work on the assessments. The time required to develop evidence, which is an iterative process involving a series of discussions with industry officials, is considered by Commerce officials to be the longest and most intractable portion of the initial phase. In commenting on a draft of this report, Commerce noted that this problem continues, although progress is being made.

The second longest time period is the period from initial Defense response to publication of determination. For the six cases that have gone through this phase, it has taken from 1 to 6 months, with a median of 5 months. In two of these cases, which initially had negative determinations, Commerce published its determination in one month. In another negative determination case it took Commerce 6 months to publish, while in the positive determination cases it took Commerce 4 months to publish in one instance and 6 months in the other two instances. In 10 other cases to which Defense had responded but Commerce had not completed action, from 1 to 38 months had elapsed, with a mean of 10 months from the Defense response, as of July 1987. Of these 10 cases, each of which initially had positive determinations, more than 3 years had elapsed since Defense's response in one case, and more than 2 years had elapsed in two others. Six and 8 months had elapsed in two more. In the other five cases, Defense's comments had just been received in July 1987 in four cases and in May 1987 in the fifth. As of January 7, 1988, three of these cases remained open. In some cases, this period included actions beyond Commerce's control, principally time for presidential consideration of a national security override. In the two completed cases involving COCOM decontrol, it took an additional 6 and 8 months to complete West/East decontrol following Commerce's publication of foreign availability.

A principal reason for the excessive length of this phase is that Commerce is reluctant to finalize a determination when Defense disagrees with Commerce's assessment. While Commerce believes it has the authority to make determinations following consultation despite Defense objections, in view of the above data it appears that Commerce is reluctant to exercise that authority. The 1985 act neither defines the term "consultation" nor indicates what the Secretary of Commerce must

do to satisfy the consultation requirement. Commerce attorneys advised us that consultation involves the provision of notice of proposal, the opportunity to comment, and consideration of comments when and if they are received. To clarify its authority, however, Commerce has included language in proposed amendments to the act that makes it clear that the Secretary does not need the approval of other agencies in making a determination.

However, there are delays even when Commerce and Defense are in agreement. For example, in one negative determination case, 6 months had elapsed from the time Defense first responded until the determination was published in the Federal Register.

Commerce consultation with the NSC has also added time to this phase. In five cases in which there was Commerce/Defense disagreement, Commerce chose to consult with the NSC. In four of these cases, Defense subsequently recommended that the President invoke the national security override provision of the 1985 act. Consideration of the override by the NSC staff and ultimately by the President for these cases took 4 months, although NSC officials advised us that they hoped the process would be faster in the future.

Commerce has not proceeded quickly following presidential action. In three of these cases—involving jig grinders, wire bonders, and 16-bit microcomputers—the President declined to override Commerce's foreign availability findings. A June 29, 1987, memorandum from the National Security Advisor to the Secretary of Commerce communicating this decision directed the Secretary to initiate the decontrol of these items in accordance with the Secretary's statutory authority. Commerce did not provide State with drafts of cables directing the U.S. delegation at COCOM to submit these items for COCOM decontrol until the week of July 20, 1987. The decontrol proposal was transmitted to COCOM on July 29, 1987.

In the case involving wire bonders, Commerce published a finding of foreign availability in the September 16, 1987, Federal Register. Notice of West/West decontrol of certain wire bonders was published in the December 23, 1987, Federal Register. Delay in this case resulted from interagency disputes, including Defense's development of new information which it claimed disproved foreign availability.

West/East decontrol for 16-bit microcomputers was implemented multilaterally on October 19, 1987, as part of a broader COCOM review of computers. However, there has been no notice of foreign availability or West/West decontrol. Publication of notice in the Federal Register has been delayed by Commerce's Office of General Counsel and Defense because of the complexity of the regulatory language for computer systems and peripherals.

In the case of jig grinders, a notice of foreign availability was published in the December 9, 1987, Federal Register. Notice of West/West decontrol of certain jig grinders was published in the December 14, 1987, Federal Register. Publication of notice in the Federal Register was delayed by interagency disputes concerning the existence of foreign availability.

Proposed Deadlines

Proposed legislation passed by the House and the Senate would establish deadlines for making foreign availability determinations on cases in which an allegation is received from an export license applicant.[1] This legislation would give Commerce 180 days in the House version and 120 days in the Senate version to publish a foreign availability determination following receipt of an allegation. If no determination were published by the end of this period, an export license would not be required for the affected good or technology.

Conclusion

Deadlines such as those proposed in legislation passed by the House and Senate and now in conference stem from the perception that it takes too long to conduct assessments, publish determinations, and secure decontrol. Given the time it now takes to complete the key phases of the process, however, Commerce will have to expedite its research and improve its process for making final determinations and publishing them in the Federal Register if it is to meet these deadlines.

Agency Comments

Commerce agrees that it is difficult to obtain information but notes that progress is being made. It also identifies other factors in the process that take time and maintains that it has shown no reluctance to finalize its assessments in the face of strong opposition from Defense, noting that it is in the best interest of national security to fully consider Defense's

[1]This provision is contained in H.R. 3, the Trade and International Economics Policy Reform Act of 1987, section 332(i)(1), and S. 1420, the Omnibus Trade and Competitiveness Act of 1987, section 1012.

arguments and evidence. We agree that it is important to thoroughly consider Defense's views. However, we believe that Commerce's reluctance is demonstrated by the amount of time it takes to finalize its decisions and by its proposed amendment to the act clarifying that it does not need the approval of other agencies in making a determination.

Defense concurred with our conclusion and expressed concern that the legislation now in conference could lead to the approval of exports of a strategic commodity without thorough analysis and consultation.

Information-Sharing Needs to Be Improved

The act directs that each federal agency with export control responsibilities furnish information to Commerce concerning foreign availability, consistent with the protection of intelligence sources and methods. It also directs Commerce, upon request or where appropriate, to furnish those agencies with information it gathers and receives concerning foreign availability.

Neither Commerce nor Defense fully shares its evidence in the consultation process. Commerce, in consulting with other agencies on its draft assessments, provides neither supporting documentation nor a summary of such documentation. However, Commerce maintains that Defense can examine the supporting documentation at Commerce's offices. Defense officials acknowledge that Commerce has on occasion advised them that its files were available for their inspection but maintain that they lack the resources to examine the information at Commerce and want Commerce to provide them with photocopies of source documentation.

Defense, in its comments on Commerce's draft assessments, also does not provide supporting documentation for its position. Defense officials agreed that information-sharing could be improved by both parties. Defense states that it does not have case files per se but is willing to make its information available to Commerce. However, Commerce maintains that Defense is not sharing information.

Commerce Is Seeking Information From Other Agencies Earlier in the Assessment Process

Until recently, Commerce did not make sufficient efforts to obtain available evidence from and access to technical staff from other agencies. In researching foreign availability, Commerce primarily relied on its own resources, which include information obtained by the U.S. & Foreign Commercial Service posts overseas and contacts with industry and trade associations. Its resources also include intelligence information available

under agreements with the intelligence community, which Commerce believes includes all relevant information.

Other agencies could provide Commerce with information that would assist in the development of evidence. Commerce, however, had, until recently, generally not advised other agencies of its assessments until it provided them with drafts for review.

We discussed this matter with officials from one of the intelligence agencies, who felt that Commerce's access to intelligence information did not give Commerce a full picture because it was not getting the intelligence agency's corporate memory on a topic. These officials said that an intelligence analyst knows far more than what is contained in individual intelligence products. They also stated that Commerce has not received all intelligence reports covered under the Commerce intelligence agreements because some of these reports have restrictions that preclude Commerce's receipt. Further, they believed that they could contribute to Commerce's foreign availability assessments on a timely basis if they were notified when a study is initiated.

Commerce officials advised us in July 1987 that Commerce is instituting the practice of notifying other agencies when initiating an assessment and requesting any relevant information. The first letters were sent July 23, 1987. Defense, in commenting on our draft report, noted that Commerce has recently been providing regular notification of the initiation of assessments. We believe that this is an important step toward improving the assessment process. When coupled with more complete guidance in Commerce's regulations as to what constitutes evidence of foreign availability, this notification will enhance the quality of data and analyses provided to Commerce. Initial notification will also help to augment Commerce's resources, which will help it process assessments in a timely manner.

Conclusion

Information-sharing needs to be improved to allow for full consideration of the evidence during the consultation process. At present, Commerce and Defense are at an impasse concerning access to evidence. Commerce has offered to allow Defense to review the evidence at its offices, but Defense maintains that it lacks the resources to do so and wants Commerce to provide copies of its evidence. Defense similarly does not provide its evidence to Commerce.

Recommendation

We recommend that the Secretary of Commerce direct the Under Secretary for Export Administration and that the Secretary of Defense direct the Deputy Under Secretary for Trade Security Policy to establish procedures for complete information-sharing consistent with the Export Administration Amendments Act of 1985.

Agency Comments

Commerce stated that it openly shares its information but has declined to photocopy entire case files for Defense. Commerce further stated that Defense has been unwilling to meet its information-sharing responsibilities under the law, has never voluntarily provided information, and has denied specific requests for information. Defense concurred with our conclusion. Defense further stated that Commerce does not indicate what specific information has been or will be used to support Commerce's assessments.

Commerce recognizes that closer cooperation in the prompt exchange of information is highly desirable. This exchange should include direct access to data at Defense laboratories, military research centers, and individual military service system commands as well as access to classified data and analyses compiled in response to Commerce's assessment notifications. Defense also agreed with our recommendation, noting that it has already approached Commerce to establish a procedure for sharing information.

Commerce's Regulations Do Not Fully Specify What Information Will Satisfy Its Criteria for Determining Foreign Availability

The 1985 act requires that in any case in which controlled goods or technology are available-in-fact to proscribed countries in sufficient quantity and of comparable quality to make the control ineffective, the Secretary may not require a validated license unless the President invokes the national security override. Commerce's regulations define foreign availability and key terms. There are four criteria, each of which must be met, to establish foreign availability. A "freely available" foreign product must be

- "of non-U.S. origin," or not subject to U.S. export or re-export controls;
- "of comparable quality," or substantially similar to a U.S.-origin item in function, technological approach, performance thresholds, maintainability and service life, or any other attributes relevant to the purposes for which controls were placed on that commodity;
- "available-in-fact," or obtained by one or more of the proscribed countries; and

- "in sufficient quantity," or available-in-fact to the proscribed countries in quantities sufficient to satisfy their needs so that U.S. exports would not make a significant contribution to the military potential of such countries.

As previously discussed, developing evidence involving foreign proprietary information is difficult. Evidence that would best establish whether foreign availability exists—such as documentation on the foreign manufacturer's sources and cost of components, on actual sales, and on the Soviet bloc's military needs—is not always available to Commerce. This type of information is most likely to be known by the foreign manufacturer and Soviet bloc purchaser, neither of which is likely to provide Commerce with such information.

Consequently, Commerce determinations are based on the best available evidence. The 1985 act, apparently in recognition of this, identifies factors Commerce may use in determining foreign availability, such as quality of end products produced and scale of production. The act further identifies as acceptable evidence foreign manufacturers' brochures, reputable trade publication articles, and depositions based on eyewitness accounts.

In the cases we reviewed, comprising more than one-third of the final or draft assessments prepared by Commerce, we found that Commerce had used a variety of evidence to support its determination of foreign availability. We generally found that the evidence used was probably what was realistically available and consistent with the information identified as acceptable in the act.

However, Commerce's regulations do not fully and explicitly state what information may be considered by Commerce in making foreign availability determinations. Commerce's regulations provide only limited guidance as to what information may accompany foreign availability submissions. Since the regulations were issued in December 1985, Commerce has gained considerable experience in assessing foreign availability, which has not been made available to the business community. For example, we found that in establishing non-U.S. origin, Commerce has essentially assumed that the criterion was met in the absence of clear evidence that the foreign product contained controlled U.S.-origin components. In determining whether a product contained controlled U.S.-origin components, Commerce has searched its licensing data base, queried U.S. manufacturers producing the good, and relied on its analysts' general knowledge. However, Commerce's regulations, while defining non-

U.S. origin, do not indicate that an absence of evidence is an acceptable indication that a product is not of U.S. origin. We believe that it is important for the business community to fully understand how Commerce establishes foreign availability. The more the business community understands the program, the more it can make use of it.

We also examined Defense's evidence in two of the six cases to which Defense had responded through July 15, 1987. In those two cases, Defense disputed Commerce's preliminary determinations. We found Defense's evidence to be generally inconclusive. It was based principally on its engineers' knowledge and information provided by technical consultants.

Conclusion

Commerce's determinations are based on the best available evidence and appear to be consistent with the information that the 1985 act identifies as appropriate for consideration. Commerce's regulations, however, do not fully disclose what information may be considered in making foreign availability determinations or reflect the experience Commerce has gained in the past 2 years. Given the congressional interest in reducing the number of controlled products, which motivated the 1985 act's revision of the foreign availability provisions, the inclusion of such information in Commerce's regulations would be helpful in establishing whether the foreign availability criteria are met as well as in promoting a better understanding of what constitutes foreign availability. Also, the clarity of the regulations would be enhanced if they provided such information, including definitions of the kinds of data that should be provided. The regulations would then more closely reflect Commerce's actual use of the evidence and provide important guidance to other federal agencies and the business community as to what evidence should be submitted to establish foreign availability.

As previously discussed, Commerce has initiated the practice of notifying and requesting information from other agencies when it begins an assessment. This practice should improve the assessment process. By providing more complete guidance in its regulations, Commerce can enhance the quality of data and analysis provided by these agencies.

Recommendation

We recommend that the Secretary of Commerce direct the Under Secretary for Export Administration to amend Commerce's foreign availability regulations to fully and explicitly reflect the guidance provided in the Export Administration Amendments Act of 1985 on the factors

Commerce may use in determining foreign availability, as well as to specify other evidence Commerce has found helpful in making such determinations.

Agency Comments

Commerce believes that, while it is impossible to set out a precise formula that is applicable generically for weighing the evidence and determining whether the criteria are met, it may be possible, in light of its increasing experience in assessing foreign availability, to consider a more detailed articulation of the kinds and quality of evidence it has found valuable in making its determinations. Defense agrees with our conclusion and recommendation, stating that a joint agreement on criteria would be of major importance to timely foreign availability determinations and noting its readiness to meet with Commerce on the matter.

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Comments From the Department of Commerce

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Administration
Washington, D.C. 20230

25 NOV 1987

Mr. John Luke
Associate Director
Resources, Community, and
  Economic Development Division
United States General
  Accounting Office
Washington, D.C. 20548

Dear Mr. Luke:

This is in reply to GAO's letter of October 2, 1987 requesting comments on the draft report entitled "Export Controls: Commerce's Foreign Availability Assessments Process Can Be More Effective."

We have reviewed the enclosed comments of the Acting Under Secretary for Export Administration and believe they are responsive to the matters discussed in the report.

Sincerely,

Kay Bulow

Kay Bulow
Assistant Secretary
  for Administration

Enclosure

UNITED STATES DEPARTMENT OF COMMERCE
Export Administration
Washington, D.C. 20230

NOV 16 1987

Mr. John H. Luke
Associate Director
Resources, Community and
Economic Development Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Luke:

In response to your letter of October 2, 1987, to then Acting Secretary Brown, I have enclosed Export Administration's comments on the draft report entitled "Export Controls: Commerce's Foreign Availability Assessments Process Can Be More Effective."

I look forward to receiving your final report.

Sincerely,

Paul Freedenberg
Acting Under Secretary
for Export Administration

Enclosure

11/2/87

Department of Commerce Comments
on
GAO Draft Report:
"Export Controls: Commerce's Foreign
Availability Assessments Process Can Be More Effective"

Our comments on the subject report are provided in two sections. The first is a general response to the report and its conclusions. The second is a detailed set of comments keyed to particular statements in the report.

A. General Response.

First, we want to express our appreciation to the GAO analysts for the constructive tone of their analysis and for the professional manner in which they conducted their investigations. Such a process of evaluation can serve both to inform members of Congress and their staff concerning the Administration's implementation of an important legislative program as well as to help identify areas for improvement.

The report draws conclusions in three areas: time required for completion of assessments, information sharing, and information needed to satisfy criteria. We address these in turn.

I. Time required:

Determination of foreign availability is a complex process involving the gathering and evaluation of information, its analysis according to certain criteria, consultation with other interested agencies of the Government, and the making of an official finding in a manner compatible with the legal requirements of the export control program. Following a finding of foreign availability the law requires decontrol unless the President overrides the finding on the basis of national security and successfully negotiates away that availability within statutory time limits.

The initial stage, the identification of needed information and its sources and the acquisition of that information, is, of course, critical to the success of the assessment. The quality of the assessment is directly linked to the quality and quantity of information acquired concerning the several criteria against which availability is determined. Recognizing the crucial role played by information in this process, we have devoted a substantial share of our resources to developing rapidly accessible data sources, both unclassified and classified, as well as to promoting a high level of current information flow throughout and among the

foreign availability staff. Nevertheless, in light of limited resources available, we still find that the acquisition of specific information relevant to a particular item being assessed requires considerable time. Such information is acquired from U.S. and foreign industry; from the intelligence community; and from government officials both U.S. and foreign. In each case, our experience is that responses to our requests for crucial information often are not received for many weeks or months.

The process of consultation with other agencies begins when an assessment is officially undertaken. At that time, all interested agencies (which always include the Defense and State Departments) are notified of the initiation of the assessment, requested to provide relevant information, and invited to consult with the Office of Foreign Availability. When the assessment has reached the stage at which a draft report has been written, that draft is circulated to the interested agencies for their comments. Heretofore, the time allotted for comments on the draft reports has been 45 days, with the process of successive responses taking weeks or months longer. The new procedures provide a 30 day period for review and comments, and we anticipate very few instances in which there will be a need for more than one response.

In the absence of a petition for national security override of a positive determination, we proceed directly to decontrol of the item. This generally requires careful drafting of new regulatory language so that controls on those items for which foreign availability has been found can be precisely excised. Often this involves specifying lower parameters of control rather than complete decontrol. The internal process of rewrite and approval of the amended regulations takes an additional period of time depending upon the complexity of the drafting and the workload in the regulatory and legal offices.

Where a petition for national security override has been made, the process extends beyond the control of Commerce officials. Subsequent procedures and coordination among the Departments of Commerce, State, and the National Security Council require considerably more time. The staff work to prepare for the President's decision can uncover significant interagency differences which demand further elaboration, particularly as they pertain to the impact on national security and to the prospects for a successful negotiation with the foreign source government(s).

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The GAO Report states that we take too long to process foreign availability determinations because of two factors: difficulty in obtaining information, and reluctance to finalize without DOD concurrence. The first problem continues, although we are making progress in dealing with it. As to the second, we have shown no reluctance to finalize our assessments, even in the face of strong opposition from DOD; however, we believe it is necessary and in the best interests of U.S. national security to fully consider the arguments and evidence provided by DOD.

The report fails to recognize the other pertinent factors in the process that take time. These include sanitizing pertinent intelligence data in order to allow its inclusion in a report at the Secret level of classification, the need to clear final drafts through legal counsel, and inevitable delays in the collection and forwarding of necessary data from U.S. embassy and consulate posts abroad. As we gain experience in the program, we continue to refine our procedures to reduce the time needed without compromising the quality of the assessments.

II. Information sharing:

Information is the sine qua non of foreign availability assessments. To the extent that we have access to current accurate pertinent information, our assessments are valid and timely. Information in the hands of other agencies, particularly the Department of Defense and the Intelligence Community, can speed up our assessments by eliminating or reducing the need to acquire information from other sources. To date, we have had excellent cooperation from the intelligence community, and, once identified, unhindered access to intelligence community officers and analysts. Most of the staff hold appropriate levels of security clearance to allow us access to high levels of classification. Individual working relationships with analysts in several different intelligence agencies covering respective areas of technology generally have been excellent. We have also encountered cooperation from the Department of Energy when initiating contacts with its laboratories.

The report is inaccurate in its portrayal of the actual state of information sharing between the Departments of Commerce and Defense. The need for information relevant to foreign availability is much greater for the Department of Commerce, and much of the relevant information exists within DOD.

The Department of Defense has been unwilling to meet its obligations under the above referenced provision of the law.

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Despite notification of the initiation of assessments and the request for relevant information, DOD has never voluntarily provided such information. Moreover, even in cases where we have made specific requests for information from DOD we have been denied that information. Contrary to the assertions of the report, Commerce has openly shared its information, both drafts and finished copies, even in the absence of specific requests for it, within the limitations imposed by the need to protect intelligence sources and methods and under relevant constraints for the protection of proprietary information. The only limitations we have placed on such sharing is that we decline to expend our limited resources on making photocopies of entire case files as has occasionally been requested by DOD. In those cases, however, we have been fully willing to allow DOD staff access to OFA files and permit them to make copies or take notes. The Department of Energy similarly has been provided such access, and has already sent staff to photocopy an entire safe full of material on foreign computers. DOD has regularly declined either to provide us with needed information or to allow us access to their files.

This section of the report concludes with the recommendation that the Departments of Commerce and Defense establish procedures for complete information-sharing consistent with the EAA, as amended in 1985. We recognize that closer cooperation between our departments in the prompt transfer of information required for foreign availability analysis is highly desirable. This cooperation should include direct access to data resident at DOD laboratories, military research centers, and individual military service system commands, as well as access to classified data and analyses compiled by DTSA in response to notification by OFA of commencement of assessments.

III. Information needed to satisfy criteria:

The criteria established for the determination of foreign availability are derived from the legislation. Whether these criteria are met depends upon the evidence available. The report suggests that a fuller elaboration of these criteria and the evidence needed to satisfy them would be helpful.

As we have gained experience with the foreign availability program we have learned that (a) we never have "complete" information, (b) the nature of the information may vary radically from case to case, and (c) due to the case-by-case nature of assessments in widely varying areas of technology, it is impossible to set out a precise formula or prescription

that is applicable generically for weighing the evidence and determining whether the criteria are met for all technology cases. The analysis of the available information requires not only traditional analytical skills but the exercise of sound judgement. Thus, it has not been attempted in the past to elaborate more fully the criteria and evidence needed. Nevertheless, it may be possible in light of our mounting experience to consider a somewhat more detailed articulation of the kinds and quality of evidence that we have found valuable in making our determinations.

B. Specific Comments.

These comments are keyed to specific chapters and sections of the report. The paragraph and page numbers in the draft text are noted within parentheses for reference.

See comment 1.

Executive Summary: Purpose

(p. 1, para 1) Language should be added to the first paragraph to reflect the multilateral nature of the controls addressed by assessments of foreign availability, e.g.:

"Since 1949, the United States and its allies have controlled the export of militarily significant commercial products to the Soviet bloc through an informal organization known as the Coordinating Committee for Multilateral Controls--COCOM. Beginning in 1977, the Congress directed that such products not be controlled if they are freely available to the Soviet bloc from other countries--known as "foreign availability"--unless the President determined that national security required such control.

See comment 2.

(p.2, para 1) The report states that Commerce has initiated 73 assessments and completed 9. There appears to be a discrepancy in the total numbers of assessments initiated and completed. Our records indicate that, as of October 1987, OFA has initiated 84 assessments and completed 67. Nine have been published in the Federal Register, but OFA's criteria for completion do not include publication in the Federal Register. For example, 22 assessments were for COCOM list review, 8 were for proposed controls, 11 were for foreign policy controls, and 2 were for licensing decisions. None of these findings are published in the Federal Register. We completed 24 assessments for decontrol and these are on record as closed cases. However, not all of these

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assessments were published by Department of Commerce in the Federal Register, since not all warranted such publication. For example, some were concluded by actions within the respective TAC or within Export Administration.

See comment 3.

(p.3, para 1) The report states, "Commerce consistently takes considerably longer to make determinations than the 90-day processing time envisioned in the Export Administration Act and the regulations." However, the Act specifies 90 days only for TAC-certified studies, with this statutory period beginning to run on the day the TAC certification from the TAC chairman is received in the Office of Foreign Availability. The lack of legally mandated deadlines has been a disadvantage to Commerce in obtaining timely responses from other agencies. The National Academy of Sciences specifically identified this drawback in its February 1987 study, and the intention of the Administration's legislative initiatives in the pending Omnibus Trade Bill is to state clearly the deadlines for completion of assessments.

See comment 4.

Beginning on p.5, then on p.10, and throughout the report, it would be more accurate and useful to the public to refer to Commerce officials by titles established by the October 1, 1987 reorganization, e.g., Under Secretary for Export Administration and Assistant Secretary for Export Administration.

See comment 5.

(p.8, para 1) The budget for fiscal year 1987 should be correctly stated as $1,215,000 -- not $4 million.

See comment 6.

(p.8, para 1) The report states the staffing level as of May 28, 1987 to be 19. This statement fails to convey the fact that the staffing level prior to that date was consistently much less. Moreover, because of the need for extensive security clearance procedures and because of the complexity of the job, new staff are not able to perform to their full potential for a period of several months after employment.

See comment 2.

(p.9, top of page) Same comments on total assessments completed as stated for p.2, para 1.

See comment 7.

(p.9, para 1) The report lists the major phases of an assessment. The text states that the first phase is developing evidence and preparing the initial draft. Actually, the first phase of major significance is

evaluation of a claim in light of the criteria under the EAA of 1979, as amended, and the Export Administration Regulations. Such language should be added.

See comment 3.

(p. 18, para 3) Same comment on 90-day deadline as for p.3, para 1.

See comment 8.

(p.24, top of page) This section describes the time delay from June 29 until September 11, 1987, in the publication of positive determinations in the Federal Register for the three cases in which the President decided not to impose a national security override. In reality, the delay was primarily due to the precedent-setting nature of these cases, i.e., the first time a White House decision had been rendered for national security override. Following the presidential decision, the DOD/DTSA raised objections again to the National Security Council, requesting the President to reconsider his decision, even after the Department of Commerce issued a press release and a public notification of the positive findings and the decision to decontrol.

See comment 9.

(p.27, para 2) The report states that officials from ONE of the intelligence agencies "... felt that Commerce's access to intelligence information did not give Commerce a full picture because it is not getting the intelligence agency's corporate memory on a topic... [and] ... Commerce does not receive all intelligence reports... because some reports have restrictions that preclude Commerce's receipt." The Defense Intelligence Agency made this allegation, which implies non-access to large quantities of reporting on technology and sales worldwide, while in reality the reference is to isolated cases of military service-specific reporting, e.g., "For Navy Eyes Only", and often concerns sui generis reporting on weapon systems of no interest to OFA. In May 1987, the CIA official serving as Director of the Office of Intelligence Liaison in Commerce specifically stated to GAO that, even though Commerce is not on distribution for all intelligence reporting, OFA analysts with appropriate clearances were provided access to all the data they required. In cases where the sensitivity of the data precluded it from being entered into automated data bases, the analysts with appropriate clearances could view the intelligence reports at CIA Headquarters in Langley. This was stated clearly to the GAO investigator in the presence of several Commerce officials, including an OFA supervisor.

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In summary, OFA has access to historical files of intelligence reporting at NSA, CIA, DIA, FSTC, NISC, NOSIC, FTD, AFMIC, MSIC, and TTIC. Through the Office of Intelligence Liaison, much of this access is real time automated data base search and retrieval. The assertion that corporate memory resides in intelligence community analysts, i.e. in personalities rather than documents, is questionable in view of the numerous reorganizations and personnel turnover in the various agencies. OFA has the advantage of at least five staff analysts with past professional experience in key agencies of the intelligence community and intimate knowledge of the vagaries of "corporate memory."

See comment 10.

(p.32, para 1) A continuation of the above argument. The report states, "... Commerce has not had information on Soviet military needs or indigenous capability to determine whether foreign production is sufficient to satisfy the bloc's needs." This is untrue. The Department of Commerce has access to such reports, both classified and unclassified. The criterion of sufficiency has been a difficult one to interpret and requires valid information and sound analysis and judgement.

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GAO Comments

1. We agree that this suggested language reflects the multilateral nature of export controls and have incorporated it in the report.

2. We stated in chapter 1 that, through July 1987, Commerce had initiated 38 reviews and 35 assessments - a total of 73 - and we described the characteristics of a review and an assessment. The total number of studies (as of October 1987) is up to 84. We recognized, in noting the kinds of foreign availability studies OFA does and the number of reviews it initiates, that OFA's work is not limited to assessments. As stated in the objectives, scope, and methodology section of chapter 1, we focused on foreign availability assessments, as opposed to reviews, because of Commerce's broad statutory authority in dealing with assessments. With respect to counting completed assessments, as stated in chapter 2, we considered an assessment complete when a determination was published in the Federal Register because this date marks the end of Commerce's direct role in the foreign availability process. Commerce, in this comment, agrees that nine determinations have been published in the Federal Register but notes that, by OFA criteria, it has completed 24 assessments for decontrol. OFA considers an assessment complete when it leaves OFA for a higher Commerce decision, which involves Office of General Counsel review and determination of foreign availability by the Under Secretary for Export Administration. We agree that turning the assessment over to higher Commerce review marks the end of OFA's control over the process and, as such, it is an important internal milestone. However, since our objective was to review the Department of Commerce's conduct of foreign availability assessments, we chose the date of publication of a foreign availability determination in the Federal Register as the date of completion of a foreign availability assessment. Commerce's regulations call for such publication upon completion of a determination.

3. Commerce notes that the act specifies 90 days only for TAC-certified studies and that the lack of legally mandated deadlines for other than TAC-certified studies has been a disadvantage. We agree and have noted that deadlines such as those proposed in legislation now in conference stem from the perception that it takes too long to make foreign availability determinations.

4. Our draft report was prepared before the October 1, 1987, reorganization. We have now revised the report to reflect this reorganization.

5. We have revised the report accordingly.

6. We have revised the report to reflect this information.

7. We have made this suggested change to the report.

8. This comment attributes the delay in publishing determinations in the Federal Register primarily to the precedent-setting nature of these cases, i.e., the first time a White House decision had been rendered for national security override. We agree that these cases were precedent-setting but believe that, once the decision was made on whether to invoke the national security override and the decision was communicated on June 29, 1987, the precedent had been set. We further believe that the delay in completing the action directed on June 29, 1987, underscores the difficulty in completing foreign availability actions.

9. Our purpose in reporting the views of this one intelligence agency was to illustrate that at least one agency's officials felt that they could make greater contributions to Commerce's assessments on a timely basis if they were advised upon a study's initiation. In July 23, 1987, letters, Commerce implemented the practice of notifying other agencies, including the Defense Intelligence Agency and the Central Intelligence Agency, when initiating a study. At a meeting with Commerce and intelligence officials, including the Director of Commerce's Office of Intelligence Liaison and the Central Intelligence Agency representative to that office, we were told that the Office of Intelligence Liaison expects the intelligence system to provide all the intelligence information called for under agreements with the intelligence community. We essentially reported this and the views of one of the intelligence agencies in chapter 2.

10. This comment refers to a comparison of Commerce's regulations to types of evidence that were contained in our draft report. We have subsequently removed this material from the report.

Comments From the Department of Defense

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

OFFICE OF THE UNDER SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301-2000

14 DEC 1987

POLICY

In reply refer to:
I-17009b/87

Mr. Frank C. Conahan
Assistant Comptroller General, National
Security and International Affairs Division
U.S. General Accounting Office
Washington, D.C. 20548-0001

Dear Mr. Conahan:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report, "EXPORT CONTROLS: Commerce's Foreign Availability Assessments Process Can Be More Effective," dated October 2, 1987 (GAO Code 483428/OSD Case 7421).

With one exception, the DoD generally agrees with the GAO findings and recommendations.

The detailed DoD comments on each finding and recommendation are provided in the enclosure. The DoD appreciates the opportunity to review and comment on the draft report.

Sincerely,

Dr. Stephen D. Bryen
Deputy Under Secretary
Trade Security Policy

Enclosure

GAO DRAFT REPORT DATED OCTOBER 2, 1987

(GAO CODE 483428) OSD CASE 7421

"EXPORT CONTROLS: COMMERCE'S FOREIGN AVAILABILITY ASSESSMENTS PROCESS CAN BE MORE EFFECTIVE

DEPARTMENT OF DEFENSE COMMENTS

* * * * *

FINDINGS

FINDING A: The Foreign Availability Program. According to the GAO, beginning in 1977, the Congress directed that militarily significant commercial products from the United States to the Soviet Bloc not be controlled if they are freely available to the Soviet Bloc from other countries (known as "foreign availability"), unless the President determined that national security required such control. Provisions for decontrolling goods and technology because of foreign availability were included in the Export Administration Act, as amended in 1977, 1979 and 1985. Under the 1985 Amendments to the Export Administration Act, the Office of Foreign Availability (OFA), within the Department of Commerce, is required to initiate and review claims of foreign availability on goods and technologies controlled for national security purposes. The GAO observed that the 1985 Act does not address how decontrol of an item based on foreign availability is to be coordinated with the U.S. multilateral export control commitments under COCOM. The GAO also observed that foreign availability studies fall into two basic categories, as follows:

- reviews--which are Department of Commerce in-house analyses of the probability of foreign availability; and

- assessments--which are analyses that can possibly lead to decontrol or license issuance.

The GAO explained that, after the OFA has developed and analyzed its evidence, a draft foreign availability assessment is prepared and reviewed within the OFA. Then, upon the approval of the Director, the draft is sent to the DoD and selected other agencies for their review, as part of the consultation process required by the 1985 Act. The GAO observed that the DoD is the principal agency in the consultation process and the only agency with which Commerce is specifically directed to consult. (The GAO noted, however, that while the 1985 Act required consultation, it does not indicate that concurrence is necessary.) The GAO concluded that the 1985 amendments were driven by congressional interest in reducing the number of products and related technologies subject to export controls. (p. 1, Executive Summary; pp. 7-11/GAO Draft Report)

ENCLOSURE

DoD Position: Concur. It is important to note that the DoD responsibilities for consultation with the Department of Commerce (DoC) range far beyond merely providing formal written responses to the preliminary (DoC) foreign availability assessments. The additional (DoD) work often includes, but is not limited to, information collection, coordination, review/analysis, and the preparation of technical and policy papers. The DoD has not, however, received any funds or personnel to perform this ever increasing foreign availability work, required by statute.

Furthermore, not only does the 1985 Act not indicate that DoD concurrence is necessary, but the law does not require Commerce to follow through on issues raised by Defense.

The DoD has previously noted that decontrol of a particular commodity will run contrary to previous or current US proposals to the Coordinating Committee for Export Controls (COCOM) to control the same item. When the U.S. Government suddenly does an about face and requests the elimination of export controls that the United States fought hard to obtain because of strategic concerns, COCOM member nations question U.S. motives. The Foreign Availability (FA) regulation needs to be amended to bring it into conformity with Sections 5 and 6 of the Export Administration Act (EAA), which recognize the U.S. Government COCOM responsibilities. The regulation should also be amended to recognize U.S. parallel responsibilities to, and cooperative efforts with, certain non-COCOM countries, which have implemented and enforce COCOM-like export controls. The DoD contends that once the U.S. Government has granted such a country preferential treatment in accordance with Section 5(k) of the EAA, that country cannot be considered as a source of foreign availability in fact. It should be obvious that once a country agrees on export restrictions comparable in practice to those of COCOM, such country has agreed not to provide controlled commodities to proscribed destinations.

ENCLOSURE

Finding B: Making Foreign Availability Determinations Takes Too Long. The GAO reported that the 1985 Act and regulations envision a 90-day processing time for making foreign availability determinations. The GAO found, however, that Commerce consistently takes considerably longer than 90 days to make determinations. Specifically, as of July 1987, the processing time for nine completed assessments ranged from 6 months to 28 months, with a median processing time of 12 months, and incomplete cases had been in process from 1 month to almost 4 years. The GAO observed that the principal reasons for the long processing times are (1) difficulties and delays in obtaining the evidence Commerce deems necessary to make foreign availability determinations, and (2) handling of differences with the DoD. Specifically, the GAO reported that:

- The longest phase of the process is the development of evidence and preparation of the initial draft assessment. Commerce has taken from 1 to 28 months to complete this phase, with a median of 7 months. Commerce officials identified several reasons for the long initial phase, including the difficulties of obtaining foreign proprietary information on products produced in other countries and the small number of analysts available to work on the assessments.

- The second longest time period is from the initial DoD response to publication of the determinations. For the six cases that had gone through this phase, the GAO found it had taken from 1 to 6 months, with a median of 5 months. A principal reason for the excessive length of this phase is that Commerce is reluctant to finalize a determination when there is disagreement with the DoD. There are delays, however, even when Commerce and Defense are in agreement. (Commerce consultation with the NSC also added time to this phase.)

The GAO further reported that proposed legislation (180 days and 120 days, respectively) passed by the House and the Senate, would establish deadlines for making foreign availability determinations on cases in which an allegation is received from an export license applicant. The GAO further observed that, if no determination were published, by the end of the time period, an export license would not be required for the affected goods or technology. The GAO concluded that the need for deadlines, such as those proposed in legislation passed by the House and Senate and now in conference, stem from the perception that it takes too long to conduct assessments, publish determinations, and secure decontrol. The GAO further concluded, however, that given the time it now takes to complete the key phases of the process, Commerce would have to expedite its research and improve its process for making final determinations and publishing them in the Federal Register, if it is to meet the deadlines contained in the proposed legislation. (pp. 18-25/GAO Draft Report)

ENCLOSURE

DoD Position: Concur. Recently the OFA has been regularly notifying DoD's Defense Technology Security Administration (DTSA) of the initiation of a foreign availability assessment. This will help to avoid later technical differences, which are the major cause of delays. In the past, the lack of notification precluded the DoD from providing timely assistance in the preparation of the initial assessments.

The statutory requirement to complete a foreign availability study within 90 days, however, is unrealistic. Moreover, the DoD does not support the cited legislation before the Congress because of the inherent danger of approving for export a strategic commodity without thorough analysis and consultation, which may require more time than that legislation would allow.

FINDING C: Information Sharing Needs To Be Improved. The GAO reported that the Act directs the following:

- that each Federal agency, with export control responsibilities, furnish information to Commerce concerning foreign availability consistent with the protection of intelligence sources and methods; and

- that Commerce, upon request or where appropriate, furnish those agencies with information it gathers and receives concerning foreign availability.

The GAO found, however, that neither Commerce nor Defense fully shares its evidence in the consultation process. Specifically, the GAO noted that Commerce, in consulting with other agencies on its draft assessments, provides neither supporting documentation nor a summary of such documentation. The GAO further noted that, according to Commerce officials, the DoD can examine the supporting documentation at Commerce offices. While acknowledging Commerce has, on occasion, advised them the Commerce files were available for inspection, the GAO reported that, according to DoD officials, they lack the resources to examine the information at Commerce and want Commerce to provide them with photocopies of source documentation,. The GAO also found that, in the DoD comments on Commerce draft assessments, the DoD does not provide supporting documentation for its position. The GAO noted that, according to Defense officials, information-sharing could be improved by both parties, but the DoD is unwilling to open its complete files to Commerce.

ENCLOSURE

The GAO reported that, when initiating an assessment, Commerce is instituting a practice of notifying other agencies and requesting any information that may relate to it. The GAO concluded that this is an important step toward improving the assessment process. The GAO further concluded that such initial notification will also help augment Commerce resources, which will be particularly important in processing thorough assessments in a timely manner. Nevertheless, the GAO concluded that information-sharing needs to be improved further to allow for full consideration of the evidence during the consultation process. (pp. 25-28/GAO Draft Report)

DoD Position: Concur. The DoD has already approached the DoC to establish a procedure for sharing information (See the attached copy of July 22, 1987 letter from the Deputy Under Secretary of Defense (Trade Security Policy) to the Assistant Secretary of Commerce for Trade Administration which addresses this issue). Aside from initial notification of upcoming foreign availability assessments, however, the DoD still does not receive from the DoC any indication as to what specific information has been or will be used to support the assertions made and conclusions reached in its preliminary foreign availability assessments.

In addition, the DoD contends that the Technical Advisory Committees (TACs) should also be required to provide their supporting documentation for review. (The statutes presently require such documentation from a TAC when it initiates a "certification" of foreign availability.)

Finding D: Commerce Regulations Do Not Fully Specify What Information Will Satisfy Its Criteria For Determining Foreign Availability. The GAO reported that there are four criteria, each of which must be met, to establish foreign availability. Specifically, the GAO reported that a "freely available" foreign product must be :

- "of non-U.S. origin," or not subject to U.S. export or re-export controls;

- "of comparable quality," or substantially similar to a U.S.-origin item in function, technological approach, performance thresholds, maintainability and service life, or any other attributes relevant to the purposes for which controls were placed on that commodity;

- "available-in-fact," or obtained by one or more of the proscribed countries; and

- "in sufficient quantity," or available-in-fact to the proscribed countries in quantities sufficient to satisfy their needs so that U.S. exports would not make a significant contribution to the military potential of such countries.

ENCLOSURE

In the cases it reviewed, comprising more than one-third of the final or draft assessments prepared by Commerce, the GAO found that Commerce used a variety of evidence to support its assumptions of what satisfied each of the above criteria. The GAO observed that, generally, the evidence used was probably realistically available and consistent with the information identified as acceptable in the Act. The GAO noted, however, that the regulations do not fully and explicitly state what information may be considered by Commerce in making foreign availability determinations, although they do identify other information that may accompany foreign availability submissions. The GAO further noted the regulations do not identify other information or factors that could be considered in assessing foreign availability . The GAO cited (as an example of evidence in use, in comparison to Commerce regulations) that, in establishing comparable quality, Commerce has used manufacturer brochures, end user accounts, and industry studies to examine functional equivalence. (The GAO noted, however, that functional equivalence is only one of the elements contained in the Commerce definition of comparable quality.) The GAO also examined DoD evidence in two of the six cases to which Defense had responded through July 15, 1987. The GAO reported that, in these two cases, Defense disputed the preliminary Commerce determination. The GAO concluded that the DoD evidence was inconclusive, based primarily on engineers' knowledge and anecdotal information. The GAO generally concluded that, by providing more complete guidance in its regulations, Commerce will help enhance the quality of data or analysis provided by other agencies. (pp. 29-33/GAO Draft Report)

DoD Position: Partially concur. The DoD contends that the use of functional equivalence to establish the criterion of comparable quality to the exclusion of relevant parametric values is one of the major causes of technical disagreements between the DoD and the DoC. The language in the Export Administration Regulations (EAR) should require the DoC to compare all products on the basis of their operational specifications, as well as their technological approach, performance thresholds, maintainability and service life, to establish the criterion of comparable quality.

In addition, the DoC use of large scale production or utilization of the product in the Soviet Bloc's civilian economy as evidence to argue that military needs have been or could be met is another practice where DoC initial draft assessments are lacking in qualitative and quantitative data. One of the primary reasons for the DoD objection to this practice is that the DoC does not provide its evidence for inspection, nor does it compare that evidence with typical large scale production techniques/timetables of technologically advanced Western nations. Without providing this evidence for inspection, the sufficient quantity criterion of the Export Administration Act (EAA) is not being given serious quantitative analysis.

ENCLOSURE

See comment 1.

The DoD does not, however, agree with the GAO conclusion that its evidence was inconclusive. The material used by the DoD in preparing its position on the two cases in question was based on input from highly qualified technical consultants to the U.S. Government and the engineering and scientific expertise of the highly qualified DoD staff. Further, the DoD does not consider the evidence to be "anecdotal," as claimed by the GAO.

RECOMMENDATIONS

RECOMMENDATION 1: The Secretary of Commerce direct the Assistant Secretary for Trade Administration and the Secretary of Defense direct the Deputy Under Secretary for Trade Security Policy to establish procedures for complete information-sharing consistent with the 1985 act. (p. 28/GAO Draft Report)

DoD Position: Concur. Any new procedures, however, should be consistent with the already established procedure outlined in the abovementioned letter from the Deputy Under Secretary of Defense Trade Security Policy) to the Assistant Secretary of Commerce for Trade Administration (see attachment).

RECOMMENDATION 2: The Secretary of Commerce direct the Assistant Secretary of Trade Administration to amend Commerce's foreign availability regulations to fully and explicitly reflect the guidance provided in the Export Administration Amendments Act of 1985 as to what factors Commerce may use in determining foreign availability, as well as specify other evidence Commerce has found helpful in making such determinations. (p. 33/GAO Draft Report)

DoD Position: Concur. A joint agreement on foreign availability criteria would be of major importance to timely foreign availability determinations. The DoD representatives are ready to meet with Commerce representatives on this matter.

ENCLOSURE

OFFICE OF THE UNDER SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301-2000

22 JUL 1987

POLICY

In reply refer to:
I-13889/87

Honorable Paul Freedenberg
Assistant Secretary for Trade
Administration
U.S. Department of Commerce
Washington, D.C. 20230-0001

Dear Paul:

Your letter of July 8, 1987, requesting my assistance in obtaining technical information relevant to foreign availability studies was of considerable surprise to me. I am acquainted with the requirement of the Export Administration Act that requires federal agencies, including the Defense Department, to provide technical information to the Office of Foreign Availability. Therefore, my staff have had instructions for sometime to be fully cooperative with your Foreign Availability Office.

After looking into the specifics of your letter, I am satisfied that my staff is working within the guidelines that I have established, and to which your Director of Foreign Availability has agreed to, for providing Defense Department technical support for foreign availability studies. The agreement, simply stated, is that the Office of Foreign Availability will provide a written request for information to my Director of Strategic Trade. My staff will then provide this information to your foreign availability staff as an official Defense Department response.

I believe this procedure is consistent with the intent of the Act. There is one further issue raised by your letter. This concerns the allegation that requests made by your foreign availaiblity staff for information from Defense Department agencies, such as the Naval Research Laboratory, have been regularly refused. To the best of my knowledge, and that of my staff, we have received few, if any, written request for such information. However, let me assure you that all such requests will be honored according to agreement.

I trust this has acted to clarify your concerns. Please let me know if I can be of further assistance.

Sincerely,

Steve

Dr. Stephen D. Bryen
Deputy Under Secretary
Trade Security Policy

ON THE OTHER HAND, WE WILL NOT TOLERATE EFFORTS TO GET AROUND THE PROCEDURES WE HAVE ESTABLISHED FOR CONTACT WITH DOD. PLEASE ADVISE YOUR PEOPLE.

GAO Comment

1. Defense disagrees with our characterization of its evidence. We agree that the term "anecdotal" is too vague and have revised our characterization accordingly. However, we continue to believe that Defense's evidence in support of its positions on the two cases we reviewed was generally inconclusive.

*U.S. G.P.O. 1988-201-749:60249

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